

TECHNICAL INFORMATION RELEASE

TIR 18-6: Northeastern University v. Commissioner of Revenue – Eligible Costs for Brownfields Tax Credit

DATE:

07/18/2018

REFERENCED SOURCES:

[Massachusetts General Laws](#)

I. Introduction

In *Northeastern University v. Commissioner of Revenue*, 92 Mass.App.Ct.1120 (Mass.App.Ct. 2017), the Appeals Court upheld a decision of the Superior Court with respect to the Commissioner’s denial of certain brownfield credit applications by nonprofit organizations.¹ This Technical Information Release (“TIR”) explains the implication of that decision for other brownfields credit applicants.

II. Discussion/Legal Background

The Massachusetts brownfields tax credit was enacted on August 5, 1998. Beginning with tax years commencing on or after January 1, 1999, a tax credit is available for a portion of the eligible costs incurred in pursuing an environmental “response action”, as defined in G.L. c. 21E, § 2. See G.L. c. 62, § (6)(j)(1) and G.L. c. 63, § 38Q(a) as enacted by St. 1998, c. 206, §§ 34, 35. The original legislation provided a credit for costs incurred between August 1, 1998 and January 1, 2002 with respect to an environmental “response action” as defined in G.L. c. 21E, § 2. That end date has been extended several times by the legislature and is currently January 1, 2024.

In order to claim the credit, applicants must achieve and maintain a “permanent solution” as defined in the Department of Environmental Protection’s regulation, 310 CMR 40.0006 or “remedy operation status” as defined in G.L. c. 21E, § 2 with respect to an environmental response action. The credit statutes as originally enacted provided that only personal income taxpayers or business corporations were eligible to receive a brownfields tax credit. In June 2006, the legislature expanded the scope of this credit to include nonprofit organizations as eligible applicants, and to authorize the transfer, sale or assignment of a credit. See Technical Information Release 06-16.

The Department of Revenue issued DOR Directive 13-4 (“DD 13-4”) to address a number of questions concerning brownfields credit applications. Among the issues addressed in DD 13-4 was whether nonprofit organizations were eligible for credits based on documentation submitted in a taxable year that commenced before the effective date of the 2006 amendment. DD 13-4 concluded that they were not.

Following the issuance of DD 13-4, the pending applications of certain nonprofit organizations were denied because they were premised upon remediation costs incurred in tax years that commenced prior to the 2006 amendment of the credit statutes. Northeastern University, the Trustees of Boston University, Wellesley College, and 131 Willow Avenue, LLC, (together the “Plaintiffs”) objected and sought judicial review under G.L. c. 30A and G.L. c. 231A, § 1, arguing that the Department erroneously denied their applications based upon the provisions of DD 13-4. The Superior Court issued a decision in favor of the Plaintiffs, which was ultimately upheld by the Appeals Court.²

III. Conclusion

Nonprofit organizations that otherwise meet the statutory eligibility criteria may apply for and receive brownfields tax credits based on costs incurred on or after August 1, 1998, even if the expenses were incurred or projects were completed prior to 2006. Additionally, credits issued prior to 2006, if otherwise eligible, may also be sold, transferred or assigned, subject to statutory limitations. Directive 13-4 remains in effect with respect to those provisions not inconsistent with the court decision.

/s/Christopher C. Harding
Christopher C. Harding
Commissioner of Revenue

CCH:RHF:ds

July 18, 2018

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1. The decision was a memorandum and order issued pursuant to Appeals Court Rule 1:28: Summary disposition.
2. On October 20, 2015, the Suffolk Superior Court issued a decision granting Summary Judgment for the Plaintiffs. See *131 Willow Avenue, LLC v. Commissioner of Revenue*, Suffolk Superior Court, Civil Action No. 2014-2603-B. The portion of the decision allowing the transfer of pre-2006 credits was dismissed by agreement of the parties. However, the Commissioner appealed the part of the opinion pertaining to nonprofit entities claiming credits based upon expenses incurred or projects completed prior to 2006. The Appeals Court affirmed the Superior Court's decision in *Northeastern University*. The Commissioner's application for further appellate review was denied by the Supreme Judicial Court on May 4, 2018.